83-500

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

SANDRA H. HARTKE

Petitioner.

vs.

DR. WILLIAM MCKELWAY

Repondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a woman's constitutional right of privacy and right to prevent procreation is infringed and interfered with, when, as a matter of law, the woman is denied damages for child rearing expenses in a case of failed sterilization with resulting childbirth as a result of medical negligence and malpractice.

2. Whether a woman's constitutional right of privacy and right to prevent procreation is infringed and interfered with, when, as a matter of law, the woman is denied damages for child rearing expenses because the mother failed to get an abortion after a failed sterilization with resulting child birth as a result of medical negligence and malpractice.

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IN THE

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No.

SANDRA H. HARTKE

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Repondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Sandra Hartke, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, appears in Appendix A - page 1.

The opinion of the United States District Court for the District of Columbia appears in Appendix B - page 1.

JURISIDICTION

Juridiction is based on 28 U.S.C. Section 1257 (3). The order sought to be reviewed was entered May and rehearing was denied on July 30, 1983.

CONSTITUTIONAL PROVISIONS

U. S. CONST., Amend. IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U. S. CONST. Amend. VI

> This Constitution, and the laws of the United States, which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding...

U. S. CONST. Amend. XIV

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. Amend. I

> Congress shall make no law respecting an establishment of religion, or prohibitng the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U. S. CONST., Amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., Amend V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,except in cases arising on the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This is a case of the invasion of a woman's right of privacy not to procreate arising out of a failed sterilization malpractice case of Sandra Hartke against Dr. McKelway. The jury found the doctor negligent on two counts and awarded the plaintiff damages for child rearing expenses in the special verdict as follows:

> "Anticipated costs of raising this child until age 18 less any benefit she received or in the future will receive by reason of the love, joy, happiness etc. she experienced in raising a healthy, happy child. $200,000."

The trial court disallowed the jury's award for childrearing expenses holding that, although such expenses may be a recoverable item of damages in a failed sterilization case, childrearing expenses were not recoverable as a matter of law based on the court's weighing of the facts in the instant case. The court based its ruling on his personal and private notion and a reweighing of the evidence of whether the sterilization was obtained solely for therapeutic reasons that is, that the plaintiff actually wanted a child because otherwise she would have had an abortion.

The U. S. Court of Appeals affirmed the decision disallowing the jury verdict of $200,000 for ordinary child rearing expenses notwithstanding the plaintiff's argument that the denial violated the constitutional rights of the plaintiff not to procreate.

The Court of Appeals' opinion found that "the jury could not rationally have found that the birth of this child was an injury to this plaintiff

and, that having a child would, on balance, be a positive experience." (Slip opinion p. 25) and that her decision not to have an abortion was conclusive that the sterilization was for therapeutic reasons and therefor child rearing expenses should be disallowed.

The District Court and the Court of Appeals gave their opinion in light of their personal and private notions that the plaintiff's failure to undergo an abortion was evidence that the plaintiff's sterilization was solely for therapeutic reasons. The Court of Appeals disregarded as unimportant that plaintiff was 36 years old and had a 16 year old daughter when the second child was born; that she specifically told the defendant doctor she "did not want to have any more children"; that her husband offered to have a vasectomy; that plaintiff testified that she had a strong objection to undergoing abortions; that she followed her treating physician's advice at all times; that she sought to avoid having another child and child-rearing expenses; that she objected to another abortion because her doctor advised her

that the health risks of abortion were as dangerous as that of childbirth. The courts claimed these facts were circumstantial and disallowed the award of childrearing expenses claiming the motive for sterilization was solely therapeutic because plaintiff chose not to have an abortion. (Slip opinion, page 24). Hartke v. McKelway, 526 F Supp 97, 105 (D.C.D.C. 1981).

This petition follows in due course. The constitutional issues involved in this petition were raised at each step of the proceedings below.

REASONS FOR GRANTING THE WRIT

THE LOWER COURTS DECIDED A QUESTION OF IMPORTANCE IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT HOLDING THAT A NEGLIGENT DOCTOR IN A STERILIZATION CASE CANNOT BE HELD RESPONSIBLE FOR THE CHILD REARING EXPENSE OF A CHILD THAT WOULD NEVER HAVE BEEN BEGET OR BORN BUT FOR THE DOCTOR'S NEGLIGENCE, THEREBY DENYING A WOMAN'S RIGHT TO DECIDE NOT TO PROCREATE AND CONCEIVE A CHILD.

This case represents still another attempt by lower courts to overrule, circumvent and nullify the Supreme Court's doctrine as set forth in Roe v. Wade (410 U.S. 113 (1978).

The consequences of the lower court's decision are that the doctor's negligence forces the woman to:

(1) exterminate, by abortion, the fetus at any time before birth, or (2) pay the expenses of rearing a child caused by the doctor's negligence.

The consequence is not only unconstitutional, it is absurd and revolting.

In the instant case, the plaintiff's zone of privacy was the decision to be sterilized; it was her personal right to so decide. It was the act of a responsible woman who through the tort of a doctor

faced the unwanted choice of aborting a child or assuming $200,000 in child rearing costs -- after having undergone the operation to specifically avoid that precise agonizing choice and expense.

The rationale of Roe v. Wade is succinctly stated by Justice Powell in Akron v. Akron Center for Reproductive Health, 43 CCH S. Ct. Bull. p 3336 (1983):

> "These cases come to us a decade after we held in Roe v. Wade, 410 U.S. 113 (1973), that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy.... And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade."

The holding and logic of Roe v. Wade requires this conclusion:

> A negligent doctor that denies a woman the right to prevent conception is responsible for the child rearing expenses of the child that would not have existed but for his negligence.

The Appeals Court postulate that their decision is not based on logic, but on practical politics! Politics should not control legal principles, nor should the private and personal notions of judges.

Judge Oberdorfer, who belatedly revealed he had been a back door neighbor and friend to the defendant/doctor, suggested that the plaintiff file a motion to recuse and then the judge denied plaintiff's motion. He held that the petitioner should have had an abortion to avoid the costs of raising a child. He places the blame for the doctor's negligence on the innocent victim -- the mother who sought to avoid conception. He claimed she had no moral objection to abortion because she had had a prior abortion, completely ignoring the uncontradicted medical testimony of two doctors that advised that the prior abortion was performed in order to save her life.

The Court of Appeals' decision refuses to recognize the authority of the Supreme Court, although

they acknowledge the Roe v. Wade, supra and Griswold v. Connecticut, 381 U.S. 479 (1965) holdings as follows:

> "But when a couple has chosen not to have children, or not to have any more children, the suggestion arises that for them, at least, the birth of a child would not be a net benefit. That is their choice and the courts are required to respect it. (U.S. Court of Appeals citing Cf. Roe v. Wade, 410 U.S. 113, 153 (1973) (woman's right to abortion: "Maternity, or additional offspring, may force upon the woman a distressful life and future.") Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (couple's right to use contraceptives). (emphasis added)

At the heart of this case is the Constitutional right of privacy as guaranteed by the First, Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments to the Constitution of the United States which sets forth the public policy considerations involved in this type of situation. Griswold v. Connecticut, 381 U. S. 479 (1965).

> "Maternity, or additional offspring may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable psychologically and otherwise, to care for the child." Roe v. Wade, 410 U.S. 113 at 153 (reh denied 410 US 959) 1973.

The guaranteed constitutional right of privacy and decision not to have a child is not determined by motive or state of mind. Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is a recognition of the importance of the parent's fundamenta right to control their productivity. The lower courts have endorsed a view that effectively nullified this right by providing that its violation results in no injury.

The lower courts rely on, with approval as authority, upon the dicta of a Minnesota case which has been specifically rejected by the Minnesota Court. The Christensen v. Thornby, 192 Minn 123, 24 N.W. 620 (1934) case relied on by the lower courts was totally rejected forty three years later by Sherlock v. Stillwater Clinic, 260 N.W. 2d 169 (Minn 1977).

The law of Minnesota is the Sherlock case,

not the Christensen case as the lower court leads one to believe. The Minnesota court allowed the costs of rearing a healthy child as damages resulting from a negligently performed sterilization operation.

> "Ethical and religious considerations aside, it must be recognized that such costs are a direct financial injury to the parents no different in immediate effect than the medical expenses resulting from the wrongful conception and birth of the child. Although public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law. The use of various birth control methods by millions of Americans demonstrates an acceptance of the family-planning concept as a integral aspect of the modern marital relationship, so that today it must be acknowledged that the time-honored command to "be fruitful and multiply" has not only lost contemporary significance to a growing number of potential parents but is contrary to public policies embodied in the statutes encouraging family planning. Recent decisions of the United States Supreme Court, moreover, seem to suggest that the right to limit procreation is a constitutional dimension. See Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 34 L. Ed 2d 147 (1973) Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed 2d 510 (1965). Compensatory damages for the cost of rearing the child to the age of majority would also, in our opinion, serve the useful purpose of an added deterrent to negligent performance of sterilization operations."

Further misleading by the District Court and Court of Appeals is their reliance for authority for their decisions Wrongful Conception: Who Pays for Bringing Up Baby? 47 Fordham L.Rev. 481, 432-35 (1978). Nothing in the Fordham article supports the lower court's decision. The Fordham article suggests the courts apply the Restatement of Torts "benefits" rule. Fordham L. Rev, supra at 431-2. This approach was followed by the jury in determining child rearing expenses in the instant case. The Fordham article states that the jury, not the judge, determines the damages and any benefit offset. Fordham L. Rev., supra, at 433. In the instant case, the jury found after considering any benefit offset that the plaintiff was damaged in the net amount of $200,000.

The decision of the lower court violates the Equal Protection Clause of the Constitution by characterizing the doctor as an elite class and not subject to the liability of paying for the costs of a child that was caused by his negligence. It is a

disguise to offer preferential treatment to absolve doctors from liability for a tortious act and a disguise to cover up the prejudice against contraceptions. It is evident in their unsubstantiated statement that "child rearing is a positive experience." The cost of raising an unplanned child, in all other cases is on the wrongdoer, not on the victim.

For example,

1. Rapist. The rapist, whose act results in the birth of child, does not have a prison term commuted because he "gave a woman a blessing" and a "positive experience". Such a ludricous argument would never be attempted. The present ruling of the lower courts would make such a decision appropriate.

2. Father of the Child. Whether born during a marriage, or out of wedlock, the courts routinely have stated that the father is responsible for support. The Census Bureau, covering up to 1981 found that 4 million absentee fathers are under court orders to pay child support. The father cannot make the argument that the mother loves the child and that

rearing the child will be a "positive experience" and he should thus be exempt from paying support for that child.

3. Runaway Father. Fathers are not outside of the law because they no longer see their offspring. They are still required to support the child. It is no excuse to hold that they are allowing the mother the "benefit of the joy of raising the child".

4. Paternity Cases. Each paternity issue has as its final nature: who will financially support the child. The dollar issue is not resolved by deciding who loves the child once it is born. The dollar issue is resolved by deciding who caused the "conception to occur".

5. Delinquents. It is common knowledge that juvenile delinquency is major problem. These children, even when loved by a mother, present economic and other costs which must be borne. No juvenile court would recognize that raising a child is always a "positive experience" and a "joy". There are no "guarantees" of how child will develop.

In a civilized world, no woman should be forced to become a mother against her will. The reason or motive for the plaintiff's decision to be sterilized is irrelevant. It is the negligence of the doctor and not the motive not to procreate that should allow the mother entitlement to damages for the costs of raising an unwanted child.

This mother -- who now has imposed on her the sole burden for child raising expense - is the mother who did not choose abortion. Yet these courts deny her compensation on their personal and private notion of why she chose to be sterilized.

This decision advocates abortion. It is an inhumane decision.

There is nothing humane in denying a mother the wherewithal to support a child caused by a doctor's negligence. There is nothing humane in a decision which effectively immunizes a doctor from his own negligence and victimizes the mother who sought to avoid having another child.

This decision places a mother in the position of demonstrating in a malpractice case that she does not love her own child. A great anomaly is apparent. The love by the mother/plaintiff for an unwanted child is used against the mother in violation of her constitutional rights. The love of a mother for the child should not be a reason for denying her financial damages. Love does not pay for raising a child.

In this case the doctor has invaded the privacy of the individual on whether to even conceive a child. Once he is found in error, the mother is made to suffer and pay for the doctor's invasion of the mother's privacy. The effect of the lower court's decisions would mean there could be no form of birth control (not even abstinence) because a woman must have sexual relations only for the purpose of having a child. As a further result, no father would pay child support because the mother would have the "joy and blessing" of having the child and paying the costs of child support herself. This fundamental

error of the Appeals Court cannot be explained away and the mischievous consequences in a negligent sterilization case are obvious:

The negligent doctor invades the privacy of the individual. Pregnancy occurs. Either the mother is forced to have an abortion, which she does not want, or: She is forced to support a child, she did not want to conceive.

Judge Oberdorfer and the Appeals Court claimed the sterilization was for therapeutic purposes, but there was never a statement that the sterilization was for "therapeutic purposes". The direct evidence is that the mother said she did not want to have any more children. Transcipt p. 105, l. 7.

The court reweighed the evidence and came to its own "personal and private" conclusion as to the motive for the sterilizaton.

The decision is unsound under established principles of law and is a clear violation of constitutional and tort law.

The lower courts decision is based on their personal and private notions of the motive the petitioner sought a sterilization. The lower courts are in direct conflict with Justice Harlan in Griswold v. Connecticut, supra:

> "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. .....The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."
>
> "The secular state is not an examiner of consciences; it must operate in the realm of behavior, of overt actions..."

The lower courts, also, directly contradict Justice Brennan, writing on Griswold in his Eisenstadt v. Baird, 405 U.S. 438 (1972) opinion:

> "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."....(emphasis added)

and contradicts Justice White's concurrence in Baird (joined by Justice Blackmum)

> "so here to sanction, a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right."

To deny all reasonably foreseeable consequences is a denial of due process of law which provides that all damages naturally flowing from a tortious act are allowable.

Roe v. Wade, supra and Griswold v. Connecticut, supra established that the right to limit procreation is a constitutionally protected right. To deny child-rearing expenses effectively nullifies that right by severely impairing the remedy available to a mother who after choosing not to have a child, found that she has a child due to a negligently performed sterilizaton. In allowing recovery for damages for child rearing expenses, it would only be compensating the mother for damages that naturally flow from the comission of the tortious act of the doctor.

This decision below carves out an exception to the normal duty of a tortfeasor to assume liability for all damages proximately caused. Public policy cannot support an exception to tort liability when the impact of that exception impairs the exercise of constitutional rights.

CONCLUSION

The right of privacy and right of whether or not to procreate is guaranteed by the Constitution. The lower courts endorse a policy that infringes and interferes with this right by denying damages resulting from the foreseeable consequences of childrrearing caused by a negligently performed sterilization operation. The right of privacy and whether or not to procreate is not a conditional right dependent on motivation nor is it one which would require the victim to have an abortion. The denial of child rearing expenses is a denial of the mother's constitutiona right.

The importance of this issue is emphasized by the large number of recent appeals throughout the country raising the same question. A notable example is the case of Cockrum v. Baumgartner, a petition for writ of certiorari in that case having been recently filed in the October 1983 term of the Supreme Court. The courts are inconsistent and uncertain about the

application of the constitutional right of privacy in light of Roe v. Wade, supra to such cases. The lower courts, in effect, overrule Roe v. Wade and Akron, the constitutional right to privacy in matters relating to having a child. This decision of the Court of Appeals of the District of Columbia Circuit holds that the right to have an abortion is converted to an obligation to have an abortion in order to avoid child rearing expenses.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2192

SANDRA J. HARTKE

v.

DR. WILLIAM MCKELWAY, APPELLANT

No. 81-2193

SANDRA J. HARTKE, APPELLANT

v.

DR. WILLIAM MCKELWAY

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil No. 79-03447)

Argued September 29, 1982

Decided May 20, 1983

Vance Hartke for appellant in 81-2193 and cross-appellee in 81-2192. *Wayne Hartke* also entered an appearance for appellant/cross-appellee.

Patrick J. Attridge for appellee in 81-2193 and cross-appellant in 81-2192.

Before MACKINNON and GINSBURG, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: These cross-appeals arise out of the failure of an operation to sterilize the plaintiff, resulting in the birth of a healthy baby girl. The primary issue for our consideration in this diversity case is whether, under District of Columbia law, the plaintiff would be allowed to recover from the defendant doctor some portion of the expenses of raising the child to majority. We are also called upon to decide whether, in the light of certain language in our opinion in *Henderson v. Milobsky*, 595 F.2d 654, 657-58 (D.C. Cir. 1978), patients in informed-consent cases must testify that they would not have undergone the procedure had they known of all the material risks involved. Finally, we must decide whether the risk of subsequent pregnancy in this case could reasonably have been considered material to a decision whether to undergo the treatment.

After a jury verdict for plaintiff on all claims, the District Court disallowed the award of childrearing expenses because it found the evidence clear that plaintiff had sought to be sterilized for therapeutic, not economic, reasons, and because she prized the child she bore. *Hartke v. McKelway*, 526 F. Supp. 97, 105 (D.D.C. 1981). The court also held that *in haec verba* testimony of causation is not required to get the issue of informed consent to the jury as long as there is otherwise sufficient evidence from which the jury could infer that a patient would have declined the procedure had he or she known of the risks. *Id.* at 103. Finding such evidence, the court upheld the jury's award of damages for plaintiff's medical expenses, pain, suffering, and mental anguish resulting from the

pregnancy and childbirth. *Id.* The court also held that a jury could have found that a reasonable person in plaintiffs' somewhat unusual position would likely have attached significance to the undisclosed risk of subsequent pregnancy here (one to three out of one thousand). *Id.* at 102-03. We affirm.

I

In the winter of 1978, Sandra J. Hartke, the plaintiff in this action, discovered she was pregnant and elected to have an abortion. For reasons that are crucial to the disposition of this appeal, and that are discussed at length below, she also sought to have herself sterilized. Her usual doctor recommended a hysterectomy, the complete removal of the uterus. Hartke, then 33, thought this a rather drastic procedure, so she approached the defendant, Dr. William McKelway, for a second opinion. Dr. McKelway recommended a procedure known as laparoscopic tubal cauterization, which involves blocking the Fallopian tubes by burning them with instruments inserted through one or two small incisions in the abdomen. Hartke consented to the procedure and on March 14, 1978, an abortion and tubal cauterization were performed on her. Dr. McKelway subsequently examined Hartke and termed the operation successful.

There was testimony from which the jury could infer that prior to the operation Dr. McKelway failed to disclose to Hartke that there was a risk of recanalization—where a Fallopian tube spontaneously reopens—of one to three out of one thousand. Hartke and her boyfriend, with whom she had lived for four years and whom she later married, also testified that the boyfriend offered to undergo a vasectomy if there was any risk of subsequent pregnancy, but that McKelway told them that the procedure was "a 100 percent sure operation," and that Hartke would not have to worry about becoming pregnant again. Record Excerpts (R.E.) at 33; *accord id.* at 34.

Despite the surgery, Hartke again became pregnant in September 1979. After an examination confirmed that the pregnancy was normal—she had had a tubal or ectopic pregnancy in 1968—she elected to carry it to term and in June 1980 gave birth by Caesarean section to a baby girl. At the same time, Hartke had herself resterilized by a tubal ligation, which involves actually cutting the Fallopian tubes. The record suggests that this method of sterilization involves about the same risk of subsequent pregnancy as cauterization. Transcript of July 23, 1981, at 145, 148 (testimony of Dr. Falk); *see also id.* at 148 (risk when ligation performed at time of delivery is greater). At the time of trial, one year after the delivery, she had not resumed sexual relations with her husband. Transcript of July 24, 1981, at 304 (testimony of Weddle (plaintiff's husband)); *see id.* at 296 (testimony of Mrs. Hartke (plaintiff's mother)).

Invoking the District Court's diversity jurisdiction, Hartke brought suit against McKelway alleging negligence in the performance of the cauterization procedure, failure to obtain informed consent, and breach of warranty. At the conclusion of the plaintiff's evidence, the District Court granted McKelway a directed verdict as to the breach of warranty claim; Hartke does not now complain of this ruling. The jury returned a special verdict, finding that McKelway negligently failed to cauterize Hartke's Fallopian tubes and that he failed to inform her of a material risk of the procedure. It awarded Hartke $10,000 in medical expenses, $100,000 for pain, suffering, and mental anguish, and $200,000 for the "[a]nticipated costs of raising this child until age 18 less any benefit [Hartke] received or in the future will receive by reason of the love, joy, happiness, etc. she experienced in raising a healthy, happy child." R.E. at 1-2; 526 F. Supp. at 106 (copy of special verdict form used).

The District Court granted in part McKelway's motions for judgment notwithstanding the verdict and for

a new trial. It held that there was no evidence of medical expenses greater than $6,000 and no evidence of future medical expenses, and ordered a new trial on this issue unless Hartke agreed to remit $4,000. *Id.* at 104. Hartke made such a remittitur.[1] The court also ruled that a new trial of the negligence claim would be necessary because one of Hartke's experts should not have been allowed to testify on the standard of care for laparoscopic cauterization. *Id.* at 101.[2] Finally, the court disallowed the award of childrearing expenses because the "weight of authority does not, and the District of Columbia courts would not, allow recovery of the costs of raising a healthy child in circumstances such as these where the plaintiff sought sterilization solely for therapeutic reasons, and prizes the child she bore." *Id.* at 105.[3] Both parties appealed.[4]

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[1] Hartke objects to this order of a new trial as unfair and unjustified. A plaintiff may not, however, appeal from a remittitur order that he or she has accepted. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam).

[2] The District Court noted that since it upheld the jury's separate verdict on the informed consent issue, a new trial on negligence would actually only be necessary if its holding on informed consent were overturned on appeal. 526 F. Supp. at 102. Since we uphold the court's ruling on the informed consent issue, we need not reach Hartke's argument that the jury's verdict on negligence should have been allowed to stand, nor McKelway's argument that he should have been granted not a new trial but judgment notwithstanding the verdict on that issue.

[3] The District Court also ruled that if its disallowance of the award of childrearing expenses were reversed on appeal, a new trial would be required on the amount of those damages because the only evidence on the question was Hartke's testimony that it had cost her about $60,000 to raise her first daughter to the age of 17. *Id.* at 105. Hartke now argues that the jury's verdict was reasonable and should be reinstated. Since we disallow the award of any childrearing expenses in this case, we need not reach this issue.

[4] Hartke's notice of appeal was limited to "that part of the Order . . . relating to the disallowance by the Judge of the

II

We deal first with the judgment that Dr. McKelway failed to disclose material risks to Hartke.

A. *Materiality of the Risk*

McKelway first argues that he had no duty to disclose the risks of pregnancy in this case since no "reasonable person in what the physician [knew] or should [have known] to be the patient's position would be likely to attach significance to the risks in deciding whether to accept or forego the proposed treatment," *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982). The risk of pregnancy after laparoscopic cauterization was testified to be one to three out of one thousand.

For present purposes, the crucial language in the above formulation is "what the physician [knew] or should [have known] to be the patient's position." The "patient's position" must include the patient's medical history and other factors that might make knowledge of certain risks particularly important to a certain patient, acting reasonably. Here, there were two factors that would make even a small risk of pregnancy unusually dangerous for a patient in Hartke's position. First, Dr. McKelway knew that Hartke had a history of gyneco-

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Jury's Verdict awarding Two Hundred Thousand Dollars ($200,000.00) for child rearing expenses." Appellee/Cross-Appellant's Appendix at 32. Since we do not reach the other issues now raised by Hartke, *see supra* notes 1, 2, & 3, we do not decide the effect of the limited notice of appeal. *Compare* Fed. R. App. P. 3(c) ("An appeal shall not be dismissed for informality of form or title of the notice of appeal.") *and* Advisory Committee Note to 1979 Amendment of Fed. R. App. P. 3(c) ("[S]o long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with.") *with* Gannon v. American Airlines, 251 F.2d 476, 482 (10th Cir. 1957) (Under old Fed. R. Civ. P. 73(b), "the jurisdiction of this court on appeal is limited to the review of the judgment or portion thereof designated.").

logical and pregnancy-related problems. She had contracted peritonitis after the birth by Caesarean section of her first child in 1964, resulting in a lengthy and traumatic hospital stay. She had had an ectopic pregnancy in 1968, apparently begun while using an IUD. She had been hospitalized numerous times for minor gynecological procedures. Hartke testified she informed Dr. McKelway that other doctors had advised her she "would not make it through [another] pregnancy." Transcript of July 21, 1981, at 8. Second, Dr. McKelway had before him conclusive evidence of the psychological effect of pregnancy on his patient. He testified that she was "extremely upset" and "very agitated" about the pregnancy. Transcript of July 24, 1981, at 311. She testified that she told him she thought she was going to die from the pregnancy. R.E. at 23.

In sum, the jury could conclude that a subsequent pregnancy would be a very serious consequence for this particular patient, which would result possibly in physical and certainly in psychological trauma. This was underscored by the testimony that Hartke's boyfriend told the doctor he would undergo a vasectomy instead if the sterilization was not sure to be successful.

Moreover, less risky paths than relying on the cauterization were open to Hartke. Had she been able to compare the relative risks of failure, she might reasonably have changed her mind and decided to undergo a hysterectomy if, as the evidence suggested,[5] the latter procedure would have reduced the risk. Perhaps more likely given her ultimate course of conduct, even if Hartke had

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[5] *Compare* Transcript of July 23, 1981, at 237 (Dr. Marlow) ("*surprisingly* . . . there have been a number of pregnancies" after hysterectomies) (emphasis added) *and id.* at 151 (Dr. Falk) (25 abdominal pregnancies have been reported in the literature) *with id.* at 148 (Falk) (risk of pregnancy after laparoscopic sterilization is one to three or four per thousand) and *id.* at 236 (Marlow) ("I know of no series in the world where there have not be[en] failures following laparoscopic sterilization.").

agreed to the cauterization, she might reasonably have decided to have her boyfriend undergo a vasectomy, abstained from intercourse, or taken other precautions that would reduce the risk.

In *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972), this court noted in this connection, "Whenever nondisclosure of particular risk information is open to debate by reasonable-minded men, the issue is for the finder of the facts." *Id.* at 788 (footnote omitted). There we held that the jury could have found a one percent risk of a very serious harm—permanent urinary incontinence and paralysis of the bowels—to be material to a decision whether to undergo an operation for back pain. *Id.* at 794. In *Henderson v. Milobsky*, 595 F.2d 654, 659 (D.C. Cir. 1978), we held that a .001% risk of permanent loss of sensation in a small section of the face could not reasonably be deemed material to a decision whether to have impacted wisdom teeth removed. In this case, the undisclosed risk was a .1% to .3% chance of subsequent pregnancy. For most people, this risk would be considered very small, but this patient was in a particularly unusual position. In view of the very serious expected consequences of pregnancy for her—possibly including death—as well as the ready availability of ways to reduce the risk, we agree with the District Court that a jury could conclude that a reasonable person in what Dr. McKelway knew to be plaintiff's position would be likely to attach significance to the risk here.

B. *Proximate Cause*

In order for there to be liability in tort, there must be both breach of duty—here, the failure to divulge a material risk—and proximate causation. McKelway argues that the issue of whether the failure to disclose the risk of subsequent pregnancy here proximately caused the harm should not have gone to the jury because Hartke had not testified that she would not have undergone the

treatment had she known of the risks. The source of McKelway's argument is certain language in our opinion in *Henderson v. Milobsky*, 595 F.2d 654 (D.C. Cir. 1978). Discussing the earlier case of *Haven v. Randolph*, 494 F.2d 1069 (D.C. Cir. 1974), the *Henderson* court wrote:

> *Haven* did not, however, add anything really novel to our jurisprudence on risk-disclosure. In result, it merely reemphasized the claimant's burden of showing that the alleged breach of duty to disclose led to the injury for which compensation is sought. In *Canterbury* we had held that when damages are sought for a condition attributed to a medical procedure, causation by breach of duty cannot be demonstrated simply by the claimant's unadorned hindsight-statement that had he known of the risk he would not have consented to the procedure. Haven *merely stands for the cognate proposition that when the claimant has not even made such an assertion, the issue of causation cannot possibly go to the jury.*

595 F.2d at 657-58 (emphasis added, footnote deleted).

The District Court rejected McKelway's argument, finding that *Henderson* should not be read to require *in haec verba* testimony from the plaintiff "as long as there is sufficient evidence from which the jury could infer that she would have refused." 526 F. Supp. at 103. The court held that to require such testimony in such a case "would only set a trap for the unwary." *Id.* Citing Hartke's husband's offer to undergo a vasectomy, the court found that there was evidence in this case "from which the jury could find that plaintiff would have declined the procedure had she been informed of the risks." *Id.*

In its ruling the District Court appears to have applied a standard of causation based on what Hartke herself would have done. This is inconsistent with the standard of causation adopted by this court in *Canterbury v. Spence*, 464 F.2d at 790-91. In that case the court held that the issue of causation should be resolved on an

objective basis, "in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance." *Id.* at 791 (footnote deleted). The rule was based on a distrust of the patient's hindsight testimony that he or she would have foregone the treatment. *Id.* at 790 (The patient's testimony "hardly represents more than a guess, perhaps tinged by the circumstance that the uncommunicated hazard has in fact materialized.") (footnote deleted). Such testimony was believed to be the primary, if not only, evidence on the question of causation in the usual case.

The District Court's confusion in this case—it charged the jury under a reasonable-person standard, Transcript of July 29, 1981, at 431—is understandable, because in both *Henderson* and *Haven*, issued after the *Canterbury* decision, this court appears to have applied a causation-in-fact rather than a reasonable-person standard. In *Henderson*, the court held that the plaintiff's testimony that he would not have undergone the procedure had he known of the risk of temporary paresthesia could not be believed because he did in fact continue the treatment once the paresthesia had appeared. 595 F.2d at 658; *see id.* at 659 ("We can hypothesize no more telling evidence of what he would have done . . . ."). In *Haven*, this court affirmed the District Court's grant of a directed verdict for the defendant, "primarily" for the reasons stated in the District Court's opinion, 494 F.2d at 1070. The trial court's holding rested in part on its finding that "there was no evidence that the parents would not have given their consent" had they known of the risks involved. *Haven v. Randolph*, 342 F. Supp. 538, 544 (D.D.C. 1972), *aff'd*, 494 F.2d 1069 (D.C. Cir. 1974).

Since the trial court's ruling in this case, however, the District of Columbia Court of Appeals has unequivocally adopted, albeit in dictum, the objective, prudent-person standard. Citing the *Canterbury* case, the court in *Crain v. Allison*, 443 A.2d 558, 563 n.14 (D.C. 1982),

wrote, "[T]he test of causation is objective. The test is what would a prudent person in the patient's position have decided if informed of all relevant factors . . . ."[6]

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[6] Despite the clarity of this statement, we confess to some doubt as to whether the District of Columbia courts will apply this rule in every case. After this court adopted the objective standard in *Canterbury*, it and the District Court were evidently confronted with cases in which the question of actual causation could be decided without reference to plaintiffs' speculation about what they would have done had they known of the risks. In *Henderson*, for example, the patient's own pretrial actions made it clear that he would have consented to the removal of his wisdom teeth regardless of whether he was informed of the risk of paresthesia. In the present case, the District Court found that the jury could have found that Hartke would have avoided the risks presented had she known of them even though she did not testify about what she would have done. In such cases, the rationale for the prudent-person standard—distrust of resting the issue of causation on the credibility of the patient's hindsight testimony—falls away, and courts feel pressure to return to the more accurate causation-in-fact standard. On the other hand, the rule one might glean from this line of cases is not entirely logical: the standard of causation by which injuries are judged ends up depending on the fortuity of whether patients happen to have created an evidentiary trail before trial demonstrating what they would have done had they known of the risks. What may eventually emerge is a standard of causation that requires the plaintiff to prove both that he or she would in fact have avoided the risk if informed of it *and* that a reasonable person would have done so.

In any case, if the District of Columbia courts would have applied a subjective standard of causation in this case, the District Court would still have been correct that *in haec verba* testimony is not required to get the question of causation to the jury. The statement in *Henderson* that seems to impose such a requirement is based on an overreading of *Haven*. *Haven* said only that there was "no evidence" that the parents would have consented, not that there was "no testimony from the parents" to that effect. Moreover, such a requirement would elevate such testimony virtually to the dominant position from which *Canterbury* and *Crain* sought to remove it. Such testimony is of little trustworthiness, so it rationally adds little to the plaintiff's case. To hinge the issue on this

Under this standard, it is no longer possible to argue that a patient's testimony is necessary for the issue of causation to get to the jury. The entire motivation for jettisoning the subjective standard of causation was distrust of precisely this testimony. As the *Canterbury* court pointed out, under the objective standard "[t]he plaintiff's testimony is relevant . . . but it would not threaten to dominate the findings." 464 F.2d at 791; *accord Crain*, 443 A.2d at 563 n.14 ("Although the patient's testimony is relevant on the issue of causation, the test of causation is objective."); *Sard v. Hardy*, 281 Md. 432, 450, 379 A.2d 1014, 1025 (1977) ("Under this rule, the patient's hindsight testimony as to what he would have hypothetically done, though relevant, is not determinative of the issue."). While it might be helpful, the jury certainly does not need the patient's testimony to decide what a reasonable person in that position would have done.[7]

III

The District of Columbia courts have not offered the same kind of guidance as to the other major issue raised

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testimony is therefore illogical. We agree with the District Court that this is undoubtedly a case in which there was sufficient evidence of what Hartke would have done, even without testimony from her directly addressing the question. *See generally supra* part II(A); Hartke v. McKelway, 526 F. Supp. at 103.

[7] It should be noted that in any case there is some testimony in this case that could be construed as *in haec verba* testimony that Hartke would have taken steps to avoid the risk had she known of it. Hartke testified as follows:

> Q. If someone offered you a million dollars for this baby, would you take it?
>
> A. Sir, *if I had known that the operation was not 100 percent, you could not give me a million dollars for that*, and for a million dollars—I would not take a million dollars for my baby, but I wouldn't go through the hell for a million dollars either.

Transcript of July 23, 1981, at 117 (emphasis added).

by this appeal: whether Hartke may recover some portion of the costs of raising to majority the child born after the failed sterilization. Moreover, as the District Court noted, the case law from other jurisdictions is almost evenly divided, some courts allowing some recovery under various formulas, others allowing no recovery whatsoever. *See Hartke v. McKelway*, 526 F. Supp. at 104 & nn. 2 & 3 (citing cases).

In large part, the differences appear to revolve around whether the child can be considered a kind of damage to the parents.[8] A number of courts have ruled that as a

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[8] Cases that do not fit into the categorization outlined in text include those that recognize that the parents may suffer damage from the birth of a child, but find that those damages are too speculative for calculation. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975); Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980). While the calculation of damages in a case like this may be difficult, we see no significant distinction between the task here and the analogous task of fixing damages for wrongful death, *see, e.g.*, Hord v. National Homeopathic Hosp., 102 F. Supp. 792 (D.D.C. 1952) (death of three-day-old infant), *aff'd*, 204 F.2d 397 (D.C. Cir. 1953), for pain and suffering, or for extended loss of consortium, *see, e.g.*, Hitaffer v. Argonne Co., 183 F.2d 811, 815 (D.C. Cir.) (loss of consortium due to permanent injuries), *cert. denied*, 340 U.S. 852 (1950). *Accord* Ochs v. Borrelli, 187 Conn. 253, 260, 445 A.2d 883, 886 (1982); Troppi v. Scarf, 31 Mich. App. 240, 261-62, 187 N.W.2d 511, 521, *leave to appeal denied*, 385 Mich. 753 (1971); Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 366-67, 428 A.2d 1366, 1372 (1981) (en banc) (Brosky, J., concurring), *aff'd*, —— Pa. ——, 453 A.2d 974 (1982). Another argument that does not relate to whether the birth of a child can be damage to the parents is that the children involved might be adversely affected when they found out that their birth was attributable to a doctor's negligence rather than to their parents' desires, or that their parents once claimed they were not worth the cost of raising them. *See, e.g., Coleman*, 349 A.2d at 14 (showing concern that child might view case as "founded on rejection of him as a person"); Note, 13 Val. U.L. Rev. 127, 142 (1978). We are not convinced that the effect on the child will be significantly detrimental in every case, or even in most

matter of law no healthy child can ever be considered an injury to its parents, because, as one court put it, "it is a matter of universally-shared emotion and sentiment that the intangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved." *Public Health Trust v. Brown*, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980) (footnote deleted), *review denied*, 399 So. 2d 1140 (Fla. 1981); *accord, e.g., Cockrum v. Baumgartner*, 51 U.S.L.W. 2534, 2534 (Ill. Feb. 18, 1983) ("In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it."). Other courts have found that there are some cases in which the addition of a child constitutes an injury to the family. One court provided the following explanation:

> To say that for reasons of public policy contraceptive failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.

Troppi v. Scarf, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517, *leave to appeal denied*, 385 Mich. 753 (1971); *see also Terrell v. Garcia*, 496 S.W.2d 124, 131 (Tex. Civ. App. 1973) (Cadena, J., dissenting ("The birth of [an "'unwanted'"] child may be a catastrophe not only for the parents and the child itself, but also for previously born siblings."), *cert. denied*, 415 U.S. 927 (1974).

Though we need not finally decide the question given our ultimate result, we suspect that allowing the plaintiff to prove that raising a child constitutes damage is the course of greater justice, and the one the District of

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cases; at least in the absence of that, we think the parents, not the courts, are the ones who must weigh the risk. *Accord* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176-77 (Minn. 1977).

Columbia courts may well adopt. Usually, of course, it is true that the birth of a healthy child confers so substantial a benefit on its parents as to outweigh the physical, emotional, and financial burdens of bearing and raising it; "else, presumably, people would not choose to multiply so freely," *Troppi*, 31 Mich. App. at 254, 287 N.W.2d at 517. But when a couple has chosen not to have children, or not to have any more children, the suggestion arises that for them, at least, the birth of a child would not be a net benefit. That is their choice and the courts are required to respect it. *Cf. Roe v. Wade*, 410 U.S. 113, 153 (1973) (woman's right to abortion: "Maternity, or additional offspring, may force upon the woman a distressful life and future."); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (couple's right to use contraceptives).

Nevertheless, courts have recognized that there is an unusual difficulty in wrongful conception cases in setting the amount of compensation, because the extent, if any, to which the birth of a child is an injury to particular parents is not obvious but will vary depending on their circumstances and aspirations. *See Troppi*, 31 Mich. App. at 256-57, 187 N.W.2d at 518-19 (consequences of birth from failure of contraceptives will vary widely with purposes and circumstances of parents, comparing unmarried college student with honeymooning newlyweds). The parents may in fact have ended up with a child that they adore and that they privately consider to be, on balance, an overwhelming benefit to their lives.[9] This is be-

[9] It has been said that courts should not allow defendants in wrongful conception cases to thrust upon the plaintiff an unwanted benefit, and that therefore a plaintiff's recovery should not be reduced by any benefits conferred by the defendant's tort. For example, one commentator has written:

> Certainly, the birth of the child may confer certain intangible emotional benefits upon the parent, but these are benefits the parent did not ask for and quite possibly cannot afford. The defendant can be analogized to an

cause the parents may have sought to avoid conception for any of a number of reasons. They may have done so for socio-economic reasons, seeking to avoid disruption of their careers or lifestyle, or to conserve family resources,

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officious intermeddler, and when he argues that the damages assessed against him should be offset by the unsolicited benefits of parenthood, the resemblance is quite striking indeed.

Kashi, The Case of the Unwanted Blessing: Wrongful Life, 31 U. Miami L. Rev. 1409, 1416 (1977).

Nevertheless, the courts that allow any recovery of childrearing damages have, with apparently only two exceptions, always required that the detriments of childrearing be offset against the benefits. *See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 256 n.3, 445 A.2d 883, 884 n.3 (1982); *Troppi*, 32 Mich. App. at 254-57, 187 N.W.2d at 517-19; Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975). *But see* Custodio v. Bauer, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967) (compensation is "to replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income"); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

It may be, as one court has said, that allowing the benefits of childrearing to reduce the damages recoverable "is nothing more nor less than the application of an offset to reduce the magnitude of verdicts and lessen the monetary shock to the medical tortfeasor and his insurer." Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); *cf.* Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (similar suggestion as to proximate cause) (quoted *infra* note 16). If this is so, it is nonetheless true that this desire to reduce the verdict is widely shared, and reflects deeply felt values. The desire may perhaps be based on a sense that, "even in this day of sophisticated contraception and family planning," couples are commonly faced with unanticipated pregnancies, Sorkin v. Lee, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 302-03 (1980). Thus, the sense of wrong that may arise in cases where the defendant usurps the plaintiffs' right to use their property as they please, *see, e.g.*, Read v. Webster, 95 Vt. 239, 113 A. 814

see, e.g., Troppi, 31 Mich. App. at 244, 187 N.W.2d at 512 (after seven children, parents decided to limit size of family); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 171 (Minn. 1977) (same); *Betancourt v. Gaylor*, 136 N.J. Super. 69, 74, 344 A.2d 336, 339 (1975) (parents sought to avoid expense of additional child); for eugenic reasons, seeking to avoid the birth of a handicapped child, *see, e.g., Ochs v. Borrelli*, 187 Conn. 253, 254-55, 445 A.2d 883, 883-84 (1982) (semble) (prior two children born with orthopedic defects); or for therapeutic reasons, seeking to avoid the dangers to the mother's health of pregnancy and childbirth, *see, e.g., Wilczynski v. Goodman*, 73 Ill. App. 3d 51, 53, 391 N.E.2d 479, 481 (1979) (therapeutic abortion); *Christensen v. Thornby*, 192 Minn. 123, 123, 255 N.W. 620, 621 (1934) (vasectomy sought because wife had been told another birth would be dangerous to her health).[10]

(1921) (flooded land), is tempered by the knowledge that the ability to be free of unwanted pregnancy has never been all that secure. The benefits that the parents of an unplanned child derive from parenthood are nonetheless real. The feeling in wrongful conception cases may be that, especially in view of the parents' concerted efforts to avoid pregnancy, they should recover something in addition to medical expenses and pain and suffering for the disruption of their planning and of their lifestyles. But to refuse to recognize the benefits of childrearing would be contrary to all the humanistic impulses that the law should seek to reinforce, *see* Cockrum v. Baumgartner, 51 U.S.L.W. 2534, 2534 (Ill. Feb. 18, 1983), and would give plaintiffs a windfall with which to deal with a problem that many couples face without compensation. Whatever the reason, the virtual unanimity of opinion on this question convinces us that the District of Columbia courts would share the sense of justice evinced by the cases, and would adopt some form of the benefits rule.

[10] The terminology used here comes from Speck v. Finegold, 268 Pa. Super. 342, 348 n.4, 408 A.2d 496, 499 n.4 (1979), *aff'd*, 497 Pa. 77, 439 A.2d 110 (1981). Our enumeration of these three reasons for seeking sterilization is not intended to exhaust the possibilities.

When a couple chooses sterilization solely for therapeutic or eugenic reasons, it seems especially likely that the birth of a healthy child, although unplanned, may be, as it is for most parents, a great benefit to them. In such cases, a court will tend to feel that it is unjust to impose on the defendant doctor the often huge costs of raising the child, and will fear that a jury that did so was motivated by passion or anti-doctor prejudice. Thus, in considering the question of whether childrearing expenses may be recoverable, many courts and commentators have placed great emphasis on the couple's reasons for undergoing sterilization. For example, the court in the earliest wrongful conception case, *Christensen v. Thornby*, made the point most clearly:

> The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation.

Id. at 126, 255 N.W. at 622 (alternative holding). Other cases are to the same effect. *See, e.g., Betancourt*, 136 N.J. Super. at 72-75, 344 A.2d at 338-39 (distinguishing denial of recovery in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967), on basis of eugenic rather than economic purpose there); *Speck v. Finegold*, 268 Pa. Super. 342, 358-59, 362, 408 A.2d 496, 505, 507 (1979) (discussing *Christensen*, *Betancourt*, and *Gleitman*), *aff'd*, 497 Pa. 77, 439 A.2d 110 (1981); *id.* at 374 n.6, 408 A.2d at 513 n.6 (Spaeth, J., concurring & dissenting) (where birth was unwanted because of risk that in the end did not materialize—such as danger to mother or fear of deformity—"arguably the damages should not include the expenses of raising the child"); *Terrell*, 496 S.W.2d at 130 (Cadena, J., dissenting) (distinguishing

Hays v. Hall, 477 S.W. 2d 402 (Tex. Civ. App.), *rev'd*, 488 S.W.2d 412 (Tex. 1972), because of eugenic purpose there); *Bishop v. Byrne*, 265 F. Supp. 460, 463 (S.D. W. Va. 1967) (under West Virginia law, victim was injured by failure of therapeutic sterilization "if the condition which [the operation] sought to avoid subsequently occurred"); *see also* Comment, *Liability for Failure of Birth Control Methods*, 76 Colum. L. Rev. 1187, 1197 (1976) [hereinafter cited as Columbia Note] ("If contraceptive measures fail here [where they have been used for therapeutic or eugenic purposes], but a normal child is born, damages might properly be denied on the theory that no injury was suffered."); Recent Case, 28 DePaul L. Rev. 249, 257 (1978) (proposing use of special negligence instruction that would consider the purpose of the sterilization and family circumstances in determining the actual damage caused); Note, *Wrongful Conception: Who Pays for Bringing up Baby?*, 47 Fordham L. Rev. 418, 432 (1978) [hereinafter cited as Fordham Note] ("In wrongful conception cases, the 'value' of parenthood will vary according to the individual's reasons for wanting the sterilization operation."); Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. Cin. L. Rev. 65, 78 (1981) ("[I]f plaintiffs in a failed sterilization case hope to gain maximum recovery, they will have to prove that the purpose of sterilization was to prevent pregnancy and not possible injury to the woman because of pregnancy.").

We tend to agree that great weight should be placed on a couple's reason for undergoing sterilization in deciding whether the subsequent birth of a child, on balance, constitutes damage to the parents. Their reason for departing from the usual view that childrearing is a positive experience is in effect a calculation of the way in which they anticipate the costs of childbirth to outweigh the benefits. That calculation, untainted by bitterness and greed, or by a sense of duty to a child the parents have brought into the world, is usually the best available evi-

dence of the extent to which the birth of the child has in fact been an injury to them. Thus, for example, where a couple sought sterilization solely for therapeutic or eugenic reasons, there is a presumption raised that the uneventful birth of a healthy child constitutes damage to the parents only to the extent that they experienced abnormal fear of harm to the mother or of the birth of a handicapped child. Courts and juries may assume that the parents treasure the child and that the usual expenses of raising it will be outweighed by the benefits derived.

The presumption raised by the evidence of the parents' reason for seeking sterilization is, however, rebuttable. If it can be shown that the parents' situation has somehow significantly changed since the sterilization—by reliance on presumed infertility in making an income-reducing career change, for example, or by a sudden increase in wealth—it may be that the original calculation of anticipated injury has changed for better or worse. *See, e.g.*, Columbia Note, *supra*, at 1197 ("the motive for having a vasectomy or tubal ligation is relevant as evidence of lack of injury but should not be dispositive"); Fordham Note, *supra*, at 435 (where motives for sterilization are economic, "sudden relief from financial hardship or a reduction in family size" after operation may make benefits override burdens); Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 Val. U.L. Rev. 127, 135 & n.66 (1978) (parent may have taken early retirement).[11] Generally, however, the plaintiff's recovery

[11] We note that some courts appear to treat the reason for undergoing sterilization not as the best evidence of whether the birth of a child constitutes damage to the parents, but as conclusive evidence of that fact. The theory is that plaintiffs should recover only for those harms that they sought to avoid. *E.g., Christensen*, 192 Minn. at 126, 255 N.W. at 622; *see* Columbia Note, *supra*, at 1197 (criticizing this per se approach). We think such an approach conflicts with the standard tort damages rule that a defendant takes his plaintiff as he finds him, and pays for all damages proximately caused. *See, e.g.*, Lockwood v. McCaskill, 262 N.C. 663, 138 S.E.2d 541

will most accurately reflect the amount of injury incurred if it is limited to paying for those risks that the plaintiff specifically sought to avoid and that came to pass.[12]

In jury trials, of course, it is usually the task of a properly instructed jury to find such facts as the plaintiff's motive in seeking sterilization and other facts reflecting the degree to which childrearing ultimately constitutes injury to the plaintiff. Nevertheless, there are always cases in which a rational jury could find that the evidence suggested only certain facts, and in those cases such findings must be directed by the court, notwithstanding the jury's verdict. On the issue of whether childrearing constituted injury to Hartke, the District Court, as

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(1964) (once breach of duty is proved, defendant is liable for all damages suffered by plaintiff notwithstanding plaintiff's peculiar predisposition to amnesia). Regardless of the reason for which the parents sought sterilization, there may be persuasive evidence that the birth of a child was, at the time of birth, damage to them; the parents may have guessed wrong in their initial calculation or they may have changed their minds. In the absence of intervening cause, the defendant must pay for that damage.

Since the approach outlined in the text is merely a guideline to be used in evaluating the evidence in the usual case, and not a conclusive test, it avoids placing undue weight on what the patient told the doctor. For any of a number of reasons, the patient may not have given the doctor all the reasons involved or even the right ones. Also, we would not want to encourage doctors to take extra care with persons who provide "expensive" reasons, or to refuse to treat them altogether.

[12] This approach will be primarily useful in cases in which the evidence of the reason for undergoing sterilization is unambiguous and overwhelming, as it is in this case. Where there is a mixture of motivations, and the socio-economic reasons are at least a but-for reason for undergoing the operation, the trier of fact will have to look to more direct, but perhaps less reliable, evidence of whether the birth of a child constitutes damage to the parents.

we read its opinion, found this to be such a case. We agree.

The evidence here is overwhelming that Sandra Hartke sought to be sterilized for therapeutic reasons: she desperately feared that serious complications or even death would result from pregnancy and childbirth. The record is filled with testimony to this effect. For example, Hartke testified that she told Dr. McKelway "that I didn't want to be pregnant, and I was terrified of being pregnant, and I was extremely concerned about doctors and hospitals. That was my overriding concern." Transcript at July 23, 1981, at 85-86. She also said she told him

> [t]hat I did not want to go through a pregnancy, that I was terrified of going through a pregnancy, and I felt I was going to die, and I had been advised by doctors that I would not make it through a pregnancy. I told him that I had peritonitis, which was gangrene, of the abdominal cavity in 1964 when I had my first daughter.
>
> • • • •
>
> . . . He said that he could perform an abortion in the hospital, and I said I didn't want to be put in this position anymore. I couldn't keep coping with the idea that I was going to die. I wanted him to help me find a way that I wouldn't have to keep going back into the hospital for all these kinds of problems. He told me that he can sterilize me.

Transcript of July 21, 1981, at 8, 14. Other like testimony is printed in the margin.[13] The testimony of Dr. Mc-

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[13] The other testimony from Hartke about her reasons for undergoing sterilization or her fear of pregnancy is as follows:

> Q. Will you tell the Court and jury what you told Dr. McKelway as to the reason that you were there?
>
> . . . .
>
> THE WITNESS: I told him that I didn't want to be pregnant because I had a very traumatic time in 1964

having my daughter, and I thought I was going to die. Okay.

Q. . . . . No more crying.

A. All right.

Transcript of July 21, 1981, at 7.

Q. . . . . Did anybody else say anything there?

A. Danny [Hartke's boyfriend] asked Dr. McKelway rather than have me go through the surgery, since I was so terrified of the hospital and surgical procedures, it would be easier—it would be easier for him to have a vasectomy.

Id. at 15.

Q. At that time did you—what did you do when you went to the hospital, as you came into the hospital?

A. I was crying, and I get very upset when I have to go to the hosptial.

. . . . .

. . . I have a very difficult time controlling myself in hospitals.

Id. at 20.

Q. Did you have any fear at that time [when making the decision not to have an abortion]?

A. Yes.

Q. What was your fear?

A. I am terribly afraid that I am going to die when I am pregnant. Every time—

Id. at 32.

"Question: What conversation did you have with him at that time?

"Answer: I didn't want to have a pregnancy, I didn't want to be ever in the position of just being pregnant again and having operations."

Transcript of July 23, 1981, at 89 (reading from deposition).

A. . . . . I did not ever want to be pregnant again. That's why I went [to see Dr. McKelway].

Id. at 90.

"Answer: Well, then I said, 'I don't want this to happen again. I am very, very upset and very nervous about going in the hospital, and I don't want to go back and would do anything. What am I to do to keep from

Kelway and of Hartke's husband was to the same effect.[14]

That the danger of childbirth remained her sole concern up to the time of her pregnancy is clear from her reasons for deciding not to have an abortion. Once the pregnancy was determined, by means of a sonogram, not to be ectopic, Hartke was advised that the risks of carrying the pregnancy to term were about the same as the risks of abortion. She testified that she decided not to have an abortion because, "[h]aving decided that the risks were equal either way, that to resterilize me Dr.

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coming back and having a pregnancy every time I turn around?'

. . . .

"Answer: I said that I didn't want to have any more children. What method was available besides the IUD? And he said, 'You could be sterilized.' "

Id. at 104-05 (reading from deposition).

A. Sir, I love my daughter.

. . . .

Q. (By Mr. Attridge) She gives you no comfort and joy whatsoever?

A. She gives me joy, but I don't know how she gives me comfort. No, she doesn't help me in the middle of the night when I am having nightmares about being pregnant, if that's what you're asking. No, that's no comfort.

Id. at 114.

[14] *See* Transcript of July 24, 1981, at 304 (testimony of Weddle) (describing Hartke's fear of pregnancy); *id.* at 311-12 (testimony of McKelway) (same); *id.* at 348 (McKelway) (reading from report about her " '*very* apprehensive' " state upon admission to hospital); Transcript of July 24, 1981, afternoon session, at 4 (McKelway) (same).

The only evidence suggesting that plaintiff had other than therapeutic motives is circumstantial: Hartke was 33 years old and had a 13-year-old daughter when she first sought to be sterilized. On the other hand, she had divorced her first husband and was then living in an apparently stable relationship with the man she would eventually marry.

Barter was going to open me back up, then I might as well try to carry the pregnancy to term, that Dr. Barter would help me through the pregnancy." Transcript of July 21, 1981, at 32. This is the only testimony regarding her reasons for carrying the pregnancy to term. It seems clear, then, that once the extraordinary dangers of childbirth for her were passed, Hartke shared the general view that having a child would, on balance, be a positive experience.[15]

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[15] In view of the result we reach, we do not need to decide the related question of whether Hartke's failure to have an abortion or place the child for adoption would preclude her from recovering childrearing expenses. *Compare* Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 ("While the reasonableness of a plaintiff's efforts to mitigate is ordinarily to be decided by the trier of fact, we are persuaded to rule, as a matter of law, that no mother, wed or unwed, can reasonably be required to abort . . . or place her child for adoption.") (footnote omitted), *leave to appeal denied*, 385 Mich. 753 (1971), *and* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977) (same), *with* Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980) (plaintiffs' failure to have abortion barred recovery of childrearing expenses), Ziemba v. Sternberg, 45 A.D.2d 230, 234, 357 N.Y.S.2d 265, 270 (1974) (Cardamone, J., dissenting) (in failed abortion case, plaintiff's failure to have another abortion after pregnancy was discovered in fourth month "should operate to bar her present claim for damages"), Columbia Note, *supra*, at 1203 n.91 (reasonableness of failure to abort could be left to jury), and Note, Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant, 68 Va. L. Rev. 1311, 1328 (1982) (question of reasonableness of failure to have abortion or place child for adoption is one of fact, not of law). Conceivably, a holding based on Hartke's failure to mitigate damages by having an abortion might reduce the damages for medical expenses and pain and suffering that McKelway must pay under our present approach, *see infra* note 16. McKelway has not pressed this claim here, however, and has in any case provided no evidence as to what Hartke's medical expenses and suffering would have been had she aborted the fetus, *see* G & R Corp. v. American Security & Trust Co., 523 F.2d 1164, 1176 (D.C. Cir. 1975) (defendant bears burden of proving mitigation).

In these circumstances, we agree that the jury could not rationally have found that the birth of this child was an injury to this plaintiff. Awarding childrearing expenses would only give Hartke a windfall.[16]

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[16] Conceivably, the benefits of childraising could be so weighty as to outweigh even the pain and anguish associated with the pregnancy and childbirth. Certainly, this is true in the usual case, since parents are apparently not deterred from having children by the usual prenatal pain and discomfort. Courts that have applied the rule of offsetting benefits against detriments in wrongful conception cases have done so in a variety of ways, however. *See generally* Note, Wrongful Birth: A Child of Tort Comes of Age, 50 U. Cin. L. Rev. 65, 79-80 (1981) (reviewing various applications of the benefits rule). Some have allowed the benefits of childrearing to be offset against all damages, so that it might happen that a plaintiff would not even recover for medical expenses or pain and suffering. *See* Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518, *leave to appeal denied*, 385 Mich. 753 (1971). Others limit the offset to reducing childrearing expenses, so that medical expenses and the pain and suffering of pregnancy would be separately recoverable. *See* Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175-76 (Minn. 1977); *cf.* Thompson v. Town of Ft. Branch, 204 Ind. 152, 164-65, 178 N.E. 440, 444-45 (1931) (in wrongful death case, cost of maintenance of son should be offset only against value of his services, not against funeral expenses). The *Restatement (Second) of Torts* offers the narrowest offset rule, requiring that the benefits conferred by a tortfeasor be considered in mitigation of damages only when the benefits are to the same "interest" of the plaintiff that was harmed. Restatement (Second) of Torts § 920 (1979). As applied in the comments, this would require that the pecuniary expenses of childraising be offset only by the monetary benefits that the child brings in, and not by the psychological or emotional rewards derived. *Id.* comment b (damages to husband for loss of consortium are not diminished by savings derived from no longer having to support wife); *see* Custodio v. Bauer, 251 Cal. App. 2d 303, 323, 59 Cal. Rptr. 463, 476 (1967) (if pregnancy benefited wife's health or emotional makeup, defendant should be able to offset that against pain and damage to health); Recent Case, 28 DePaul L. Rev. 249, 254-57 (1978) (criticizing courts for misapplying *Restatement* rule); Note, 13 Val. U.L. Rev.

127, 159 (1978) (same); Note, 68 Va. L. Rev. 1311, 1326 (1982) (same). The overwhelming majority of courts that have invoked the benefits rule in wrongful conception cases have rejected the strict terms of the *Restatement* approach.

Few of these sources provide a clear rationale for the lines they draw. Perhaps the most logical approach, in light of the presumptions discussed in this opinion, would be to allow the benefits of childrearing to be offset against the normal pain and expenses of pregnancy and childbirth, but not against any extraordinary expenses and pain associated with the conditions that moved the parents to seek sterilization. *See supra* p. 20. This suggestion may, however, attempt to put too fine a point on an admittedly uncertain calculation. Once again, *see supra* note 9, it may be that the courts' motivations are most accurately stated in terms of rough justice or public policy, like the explanation once given of the concept that damages are limited to those proximately caused by a tort:

> What we . . . mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.

Palsgraf v. Long Island R.R., 248 N.Y. 339, 352, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting) (quoted in Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 366, 428 A.2d 1366, 1372 (1981) (en banc) (Brosky, J., concurring), *aff'd*, —— Pa. ——, 453 A.2d 974 (1982)).

The District Court in this case allowed the benefits of childrearing to be offset against the expenses thereof, but not against the expenses and pain associated with the pregnancy itself. 526 F. Supp. at 106 (special verdict form). We think this was a fair place to draw the line. The latter expenses and pain are more clearly separable from the benefits of raising a child than are the expenses of raising it. *See generally Troppi*, 31 Mich. App. at 255, 187 N.W.2d at 518 (positing the severability criterion, but concluding that "pregnancy and its attendant anxiety, incapacity, pain, and suffering are inextricably related to child bearing"); *cf. generally* Wilczynski v. Goodman, 73 Ill. App. 3d 51, 63, 391 N.E.2d 479, 488 (1979) (recovery of childrearing expenses disallowed on public policy grounds but medical expenses deemed compensable because they have little to do with a child's right to life); *Thompson*, 204 Ind. at 164, 178 N.E. at 444 (in wrongful

IV

The judgment of the District Court is affirmed.

It is so ordered.

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death action, funeral expenses and medical expenses are a "distinct item[] of damage[]," separate from the value of lost services). More important, if the benefits of childrearing were offset against all damages, it might happen that the defendant would pay no damages whatsoever, which would not provide any disincentive to negligence. *See Wilczynski*, 73 Ill. App. 3d at 63, 391 N.E.2d at 488; *Mason*, 286 Pa. Super. at 381, 428 A.2d at 1380 (Hester, J., concurring & dissenting) (" 'immunity tends to foster negligence while liability tends to induce care and caution' ") (quoting Flagiello v. Pennsylvania Hosp., 417 Pa. 486, 505, 208 A.2d 193, 202 (1965) (original reads "neglect" not "negligence")). Therefore, we agree that Hartke may cover damages for her medical expenses and pain and suffering during pregnancy and childbirth without regard to the benefits of childraising.

Generally for the reasons stated in the District Court's opinion, 526 F. Supp. at 103, we will not disturb its ruling as to the remaining issue raised by McKelway: that he was entitled to a new trial because of the court's failure to reopen discovery in order to allow him to depose one of Hartke's witnesses. Hartke notified McKelway of the experts she expected to have testify almost two weeks before the close of discovery. McKelway did not notify Hartke of his experts' names until three months later. Under these circumstances, there was no abuse of discretion in allowing Hartke to depose McKelway's experts after the close of discovery, while refusing to allow McKelway to depose Hartke's at that time.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANDRA J. HARTKE	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action NO. 79-3447
	:	
DR. WILLIAM MCKELWAY	:	
	:	
Defendant	:	
	:	

MEMORANDUM

This case is currently before the Court on defendant's motions for judgment notwithstanding the verdict and for a new trial. After considering the submissions of the parties and reviewing the record in this case, and in particular, the transcript of the testimony of Dr. Suryabala Goswami, the Court concludes tht the defendant's motions must be granted in part and denied in part, as appears more fully below.

This is what is sometimes known as a "wrongful conception" case. The plaintiff, Sandra Hartke, fearful of becoming pregnant due to previous problems such as an ectopic pregnancy, went to Dr. McKelway, the defendant, for a second opinion on the best method of assuring that she would not become pregnant. It was subsequently discovered that Ms. Hartke was pregnant at the time she consulted Dr. McKelway. On his advice, she agreed to undergo a surgical procedure known as laproscopic cauterization, which essentially involves the burning of the fallopian tubes. This procedure has a failure rate of between 1 and 3 in 1,000. Nonetheless, there was considerable evidence that defendant told plaintiff that she need not concern herself with the possibility of becoming pregnant in the future once she had this operation. In March 1978, Dr. McKelway performed an abortion to terminate plaintiff's existing pregnancy and performed the laproscopic cauterization in an effort to prevent her from becoming pregnant in the future. Despite

the surgery, in September of 1979 plaintiff again became pregnant. She elected to carry this child to term, and in June 1980 gave birth, via Caesarian section, to a normal baby girl.

Plaintiff presented three theories on which to base recovery in this case: negligence in performing the operation, failure to obtain the patient's informed consent to the procedure performed, and breach of a warranty that plaintiff would not become pregnant. At the close of plaintiff's case, the Court granted the defendant's motion for a directed verdict on the warranty claim, holding that as a matter of law plaintiff had failed to provide sufficient proof that defendant had guaranteed favorable results in view of the fact that plaintiff signed consent forms which stated that no guarantee of favorable results was given. See Sard v. Hardy, 379 A.2d 1014 (Md 1977). The Court denied defendant's motions for directed verdict on the negligence and informed

consent counts. The case was submitted to the jury with a special verdict form (a copy of which is attached). The jury found for plaintiff on both remaining theories, and awarded her $310,000 in damages, broken down as follows: $10,000 for medical expenses; $100,000 for pain, suffering, and mental anguish; and $200,000 for the future cost of raising the child less the benefits of the child's comfort and society. Defendant renews his motions for directed verdict here, as well as moving for new trial on several grounds. In addition, he asks for judgment on the ground that plaintiff has not stated a claim for relief, and maintains that damages are not recoverable as a matter of law for the costs of raising a healthy child. The Court will address these contentions in turn.

I. Failure to State a Claim

Defendant urges that the Court should not recognize a cause of action where an unplanned conception results from defendant's tortious conduct,

but should wait for the legislature to create such a claim. While the District of Columbia courts have yet to confront the issue, the weight of authority in other jurisdictions clearly supports the existence of such a claim as a matter of common law. See cases cited in Section IV, infra. The cases cited by defendant as denying recovery altogether for wrongful conception in fact deal only with whether certain elements of damages are recoverable, such as the cost of raising a child. See Coleman v. Garrison, 349 A.2d 8 (Del. 1975); Terrell v. Garcia, 496 S.W. 2d 124 (Tex.Civ. App. 1973), as clarified in Garwood v. Locke, 552 S.W. 2d 892 (Tex. 1977). Since all recent cases appear to contemplate some sort of recovery in tort for negligent failure of a physician to sterilize effectively, the Court concludes that the District of Columbia courts would be likely to follow the clear weight of authority and recognize such a cause of action. See Julander v. Ford Motor Co., 488 F2d 839 (10th Cir. 1973) (upholding district

court determination that Utah courts would follow the weight of authority in adopting strict products liability, despite the fact that they had not yet done so). This is not a case like the collateral estoppel issue in Gatewood v. Fiat, S.p.A., 617 F.2d, 820,826 n.11 (D.C. Cir. 1980) where the D.C. courts had addressed the issue and had not yet adopted the trend of the case law; rather, this issue is like the jursidictional issue in that case, where there was no D. C. case law and the court therefore looked to the law of other jurisdictions. Id. at 824-25.

II. Negligence Claim

In support of his claim that he is entitled to judgment as a matter of law on the negligence claim, defendant points to the general rule that expert testimony is required to support a claim that defendant's conduct did not meet the applicable standard of care. Robbins v. Footer, 553 F.2d 123 (D.C. Cir. 1977). He also points to the lack of qualifications of plaintiff's only expert, Dr.

Goswami, who is not, as the defendant is, Board certified in obstetrics and gynecology, but rather is a certified Family Practitioner. In response, plaintiff cites the case of Baerman v. Reisinger, 363 F.2d 309 (D.C. Cir. 1966), which holds generally that a physician is competent to testify even though not a specialist in the field of which she speaks, and that specialization goes to weight rather than admissability.

Dr. Goswami was invited by plaintiff and admitted by her then doctor (not the defendant) to witness the Caesarian delivery. During this procedure, she literally observed with her eyes the fallopian tubes which had been the object of the unsuccessful sterilization attempt by defendant.

Dr. Goswami received her medical training in India and Great Britain. She did not specialize in obstetrics and gynecology, serving only one year in residency in that field, while three years are required for certification. Transcript of the Testimony of Dr. Goswami at 116-17. While Dr. Goswami has

had considerable practice as a result of her Family Practice in the United States from 1971 until present, she has performed no surgical procedure since then. Id. at 217. She has never performed the operation in question, has never assisted in the performance of such an operation, and has observed such operations on only two occasions. The Court orginially granted plaintiff's motion to qualify Dr. Goswami as an expert.

This decision rested on her training and experience in gynecology and obstetrics in India, England and at the University of Maryland. Her uncontradicted testimony that she performed several hundred tubal ligations, id. at 49, coupled with her experience and training in the United States qualified her to testify as to the standard of care in respect of conventional tubal ligations by surgery —actual cutting of the tube. Any difference between her opinion as to the correct standard and the opinion of other physicians with better or more elegant qualifications would be for the jury. But the evidence as it unfolded

indicated that her knowledge of the standard of care in respect of tubal ligations by separation of the fallopian tubes did not extend to knowledge of the standard of care for sterilization by the laproscopic cauterization procedure. She had no training or experience in that procedure. Laproscopic cauterization is relatively new, and the evidence revealed significant differences between the two procedures. Her reading of literature and conferring with other physicians on the eve of trial did not qualify her to testify about the standard of care for laproscopic cauterization. Specifically, she was not able to address with any authority the question of whether the relevant standard of care contemplated the sterilizing effct of cauterizing and thereby congealing a fallopian tube without actually severing it. In fact, she testified that a major reason for her conclusion that there was negligence was that the result was unfavorable. Id at 155-56.

Upon reflection, the Court concludes that

although she was competent to testify about her observations, Dr. Goswami was not a qualified expert on the standard of care for laproscopic cauterization procedures. While Baerman holds that a doctor need not be a specialist to testify, it does not remove the requirement that, in order to give an opinion on whether the defendant complied with the applicable standard of care, the witness must be familiar with that standard. Robbins v. Footer, supra. The trial court must weigh the qualifications of the witness and determine whether or not she is qualified to express an opinion on the subject. Sher v. DeHaven, 199 F. 2d 777, 782 (D.C. Cir., 1952) cert. denied, 345 U.S. 936 (1953). Although her eyewitness account of her observations in the delivery room were essential and admissible, the Court not concludes that Dr. Goswami was not competent to express an opinion on the defendant's due care of lack thereof, and should not have been allowed to testify about the standard of care for laproscopic cauterization.

Moreover, the Court is convinced that its failure to prevent Dr. Goswami from testifying concerning the standard of care was not harmless. Except for the testimony of Dr. McKelway, who was called by the plaintiff and testified that the standard of care required cauterization of both left and right fallopian tubes, Dr. Goswami was plaintiff's only expert. The Court cannot conclude that the jury necessarily would have reached the same result on the negligence issue without the benefit of her opinion. In addition, much of Dr. Goswami's testimony was to the effect that it violated the standard of care for defendant to perform the laproscopic cauterization technique on a patient with a history of peritonitis and on a patient more than twelve weeks pregnant. But the dangers of such violations of the standard of care did not materialize in this case and are concededly causally unrelated to the plaintiff's pregnancy. The Court originally admitted this evidence on the ground that the jury was entitled to know the context in which the operation occurred. It now appears to

the Court that the prejudicial effect of this "negligence in the air" testimony outweighed its rather minimal probative value, and that it should have been excluded. This is particularly so where its importance was seemingly highlighted by what the Court has not determined to be an unqualified witness. Accordingly, the jury's verdict that defendant was negligent cannot stand.

The Court concludes nonetheless that there was sufficient evidence of negligence, even without Dr. Goswami's opinion, to create an issue for the jury so that defendant's motion for a judgment notwithstanding the verdict must be denied. The plaintiff called the defendant, Dr. McKelway, and he testified that the standard of care requires some cauterization of the tube so that failure to cauterize one of the plaintiff's fallopian tubes would violate the standard of care. In addition to Dr. McKelway's standard of care testimony which required submission of the case to the jury, experts called by the

defense confirmed that the standard of care required substantial cauterization of each tube. There was evidence, albeit weak, from which the jury could have concluded that Dr. McKelway failed to cauterize the right tube at all. Dr. Goswami testified that when she observed the plaintiff during her delivery by Dr. Barter in June 1980, plaintiff's right fallopian tube was intact. Even though Dr. Goswami was incompetent to testify concerning the standard of care, she was competent to testify concerning what she observed during plaintiff's subsequent delivery, and that testimony was sufficient to create a jury issue. Defendant's witnesses did not succeed in rebutting plaintiff's evidence of negligence to such an extent that the Court could find that no reasonable jury could have found Dr. McKelway negligent. Accordingly, defendant's motion for judgment notwithstanding the verdict for failure to prove standard of care must be denied.

In view of the foregoing, if the only issue decided by the jury were negligence, the setting

aside of the finding and verdict would obviously require a new trial. In this case, however, the Court obtained from the jury a special verdict which found for the plaintiff on both the negligence and the informed consent counts. Since the Court concludes that the informed consent verdict is sound, and since that verdict is sufficient to support the damages awarded, a new trial on the negligence count is unnecessary. Many courts have noted that where a general verdict is returned, a new trial must be ordered if either count must be set aside. This danger was avoided here by use of a special verdict, which, as stated by the Court in Mueller v. Hubbard Milling Co., 573 F2d 1029, 1038 n. 12 (8th Cir. 1978), "will often obviate the necessity of deciding difficult legal questions which are not essential to an appropriate disposition of the controversy." See also King v. Ford Motor Co., 597 ld 436, 439 & n.2. (5th Cir. 1979); Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 245 (1967). The two counts were clearly separated from each

other in the instructions, which characterized the informed consent count as "another issue" after the negligence instructions.

As discussed below in Section III, expert testimony is not necessary or even particularly relevant on the issue of whether or not the physician adequately disclosed the risks of the operation to the patient. Canterbury v. Spence, 464 F.2d, 772, 791-92 (D.C. Cir. 1972). While expert testimony is required to establish what the risks are — id.- - Dr. McKelway himself provided that information. The Court is satisfied that Dr. Goswami's testimony did not prejudice the defendant on the informed consent count, and that it is therefore unnecessary to order a new trial on the negligence count. Should the Court of Appeals reverse this Court's decision on the informed consent count, however, then a retrial on negligence would be in order. Accordingly, defendant's motion for a new trial is denied. If the Court of Appeals reverse this Court's judgment on the informed consent count, defendant's motion is granted.

III. The Informed Consent Claim

Defendant makes essentially two attacks on the finding of the jury that he did not adequately inform her of the risks of pregnancy of this procedure, estimated by various witnesses at between 1 and 3 in 1,000. First, defendant contends that in view of plaintiff's strongly expressed desires to be sterilized and the risks associated with various alternatives, reasonable persons could only conclude that the risks involved here were immaterial. Even though the risks were small, however, the defendant was on notice that plaintiff had a great anxiety about any possible future pregnancy, and indeed could possibly have died from a future pregnancy. In the District of Columbia, the relevant standard of materiality is expressed in Canterbury v. Spence, supra, at 787: "a risk is material when a reasonable person in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego

the proposed therapy." There is ample evidence from which a jury could conclude that a reasonable person in plaintiff's position would have considered important even a relatively small chance of pregnancy.

Defendant's second contention on this issue is that no proximate causation has been shown as there is no evidence that plaintiff would have foregone the surgery had she been informed of the risks. He points to a statement in Henderson v. Milobsky, 595 F. 2d 654, 658 (D.C. Cir. 1978) to the effect that where claimant has not asserted that had she known of the risk she would not have undergone the treatment, the issue of causation cannot go to the jury. Defendant asserts that plaintiff never stated in her testimony that she would have avoided the operation had she known of the risks. This Court does not interpret Henderson, supra, to require that plaintiff make this assertion in haec verba, as long as there is sufficient evidence from which the jury could infer that she would have refused. There is

ample evidence to that effect here. For example, plaintiff's husband testified that had he known of the risks of pregnancy, he would have undergone a vasectomy. To require plaintiff herself to make this assertion in a case such as this when her husband testifies to this effect in her presence would only set a trap for the unwary. The Court is satisfied that there was evidence from which the jury could find that plaintiff would have declined the procedure had she been informed of the risks. Defendant's motion for judgment notwithstanding the verdict on the informed consent count is denied.

Defendant raises a number of contentions of prejudice from plaintiff and her counsel's conduct during the trial which are relevant to a motion for new trial on both counts. These include allegations that plaintiff's crying on the witness stand, questioning about defects in hospital records, statements about absent witnesses and various other allegedly inflammatory remarks made by plaintiff's counsel prejudiced the

jury against the defendant. The Court is satisfied that any prejudice was cured by instructions to the jury to disregard such statements. In addition, defendant's counsel himself stated in closing argument that plaintiff was blackmailing defendant and that plaintiff and her family only wanted money, statements with at least as much prejudicial potential as any made by plaintiff. Defendant's motion for new trial on these grounds is denied.

Finally defendant argues that he is entitled to a new trial because he was not allowed to reopen discovery to depose Dr. Goswami. The Court notes that defendant was informed that Dr. Goswami was a potentital witness some two weeks before discovery ended and did not seek to depose her then. Despite this fact, the Court allowed defendant an extensive voir dire, in the nature of a deposition, before Dr. Goswami testified. The Court is satisfied that no prejudice to the defendant on the informed consent issue resulted from his inability to depose Dr.

Goswami, and since the Court has decided to set aside the negligence verdict should the informed consent judgment be reversed, it is unnecessary to decide whether defendant was unduly prejudiced on the negligence count.

Accordingly, defendant's motion for new trial on this ground is also denied.

IV. Damages

The Court was aware before the trial of this case began that there is a sharp division of authority among various courts on the issue of what damages are recoverable in wrongful conception case such as the present one.[1] Accordingly, the court submitted the case to the jury with a special verdict form which required the jury to separate the damages awarded into medical expenses; pain, suffering, and mental anguish; and the cost of raising te child less an

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[1] Although many of the case cited infra involved wrongful failure to abort, the issues are essentially the same.

offset for the benefits of the child's comfort and society. In so doing, the Court intended to avoid a possible retrial in its determination of what damages were recoverable in a case such as this were later reversed.

Defendant challenges the sufficiency of the evidence with respect to all three elements of damages. On the medical expense portion, defendant points out that there is no evidence to support expenses greater than $6,000, the amount claimed in plaintiff's closing argument. Plaintiff claims that the jury may have estimated future medical expenses to arrive at the $10,000 figure. However, there is no evidence to support a finding of future medical expenses. Accordingly, the Court will grant defendant's motion for new trial limited to the amount of plaintiff's medical expenses, unless plaintiff agrees to remit $4,000.

Defendant claims that the amount of $100,000 for pain, suffering, and mental anguish is excessive. While the figure is high, the Court concludes that it is not so excessive as to require the Court to set it aside, in view of plaintiff's testimony concerning her fear of pregnancy and the obvious effects which her experience has had on her, which were corroborated by several of plaintiff's witnesses. Defendant himself admitted that plaintiff was very frightened about the possibility of pregnancy when she came to him for advice on how best to avoid it. The Court will not disturb the jury's verdict on this issue.

Finally, defendant objects to the awarding of costs of raising plaintiff's healthy child as an element of damages. On the issue of whether such damages are recoverable, the courts are almost evenly divided. Approximately, one-half of the courts which have reported such cases award such damages, reasoning

that plaintiff should be compensated for all damages which result from the defendant's tort and the burden of any uncertainty in damages should fall on the defendant.[2] Others deny recovery, holding that public policy dictates a finding that the costs of raising a child are offset by the benefits of its society and comfort, and that at any rate it is unjust to place on the physician the entire cost of raising the child while plaintiff retains all of the benefits, particularly in view of the plaintiff's

[2] See Cockrum v. Baumgartner, 50 U.S.L.W. 2040 (Ill App., July 2, 1981); Mason v. Western Pa. Hosp., 428 A.2d 1366 (Pa. Super. 1981); Anonymous v. Hopsital, 398 A.2d 312 (Conn. Sup. 1979); Sherlock v. Stillwater Clinic, 260 M.W. 2d 169 (Minn. 1977); Rivera v State, 404 N.Y.S. 2d 950 (Ct. Cl. 1978); Troppi v. Scarf, 187 N.W. 2d 511 (Mich. App. 1971); Custodio v. Bauer, 59 Cal. Rpt. 463 (Cal. App. 1967).

choice to keep the child rather than opt for abortion or adoption.[3] Most which allow recovery of child-rearing costs require an offset of the child's society and comfort.[4]

There does not appear to be any indication in the case law of which view is likely to be adopted by the District of Columbia courts. The question, not yet decided in the District of Columbia or at

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[3] See Sorkin v. Lee, 434 N.Y.S.2d, 300 (App. Di. 2980), appeal dismissed, 53 N.Y. 2d 797 (1981); Public Health Trust v. Brown, 388 So. 2d, Berman v. Allan, 404 A ld 8 (N.J. 1979); Wilczynski v Goodman, 391 N.E. ld 479 (Ill. App. 1979); Jacobs v. Theimer, 519 S.W. 2d, 846 (Tex. 1975); Coleman v. Garrison. 349 A.2d.8 (Del. 1975); Reich v. Medical Protective Co., 219 N.Y. 2d 242 (Wisc. 1974).

[4] See Troppi v. Scarf, supra; Restatement (Second) of Torts §920. See verdict form attached hereto.

common law in Maryland, is closely balanced and difficult. On one hand there is something inherently distasteful about holding a child is not worth what it costs to raise it, and something seemingly unjust about imposing the entire cost of raising the child on the physician, creating in the words of one court "a new category of surrogate parents."[5] On the other hand, the admitted uncertainty of damages should not work to the plaintiff's disadvantage, as the normal rule is to place the burden of uncertainty on the wrongdoer. See, e.g., Story Parchment Co.v. Paterson Parchment Paper Co., 282 U.S. 555 (1931). And it seems wrong to hold that a child is, as a matter of law, worth the costs of raising her when the parents have chosen differently in deciding against more children.

However these factors would be balanced in the more difficult case where the plaintiff originally

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[5] Reich v. Medical Protective Co, supra, at 244.

sought sterilization for economic reasons, that is not this case. The evidence is clear that plaintiff sought sterilization because she had previously suffered an ectopic pregnancy, and feared for her life should she become pregnant again. There is not evidence to support the view that she sought to avoid the expenses of raising another child. Plaintiff is, of course, entitled to be compensated for the physical and mental anguish she suffered as a result of defendant's tort. To allow her to recover in addition the costs of raising this child would be to give her a windfall.

This conclusion is supported by the fact that once she learned that this pregnancy was a normal pregnancy rather than an ectopic one, plaintiff chose not to have an abortion, though during her previous pregnancy she had chosen to terminate the pregnancy. This indicates that her decision to keep

the child was not the result of principled objections to abortion. This, along with the plaintiff's testimony that she now loves the child and that it is a source of pride and joy to her and her family, convinces the Court that defendant's wrong against plaintiff consisted in imposing the pain, suffering, and mental angush of a pregnancy on her, not in imposing the costs of a healthy child greatly cherished by its mother. See Christensen v. Thornby, 255 N.W. 620 Min.. 1934), distinguished on this ground in Troppi v. Scarf, 187 N.W. 2d 511, 514 (Mich. App. 1971); Note: Wrongful Conception: Who Pays for Bringing Up Baby? 47 Fordham L. Rev. 418, 432=35 (1978). Accordingly, this Court concludes that weight of authority does not, and the District of Columbia courts would not, allow recovery of the costs of raising a healthy child in circumstances such as these where the plaintiff sought to be sterilization solely for therapeutic reasons, and prized the child she bore.

The case where sterilization is sought for economic reasons is not before the Court.

Finally the Court must address the issue of what action to take should the Court of Appeals reverse this last determination. See Fed. R. Civ. p. 50 (c). There is little, if any, support for the $200,000 figure which the jury found to be the cost of raising the child less the offest for benefits. Plaintiff testified that the costs of raising her previous child, born in 1964, was approximately $60,000. In act, in her pretrial brief, plaintiff estimated her cost of raising this child at $60,298. Plaintiff now argues that the jury could have made a rough adjustment for inflation and arrived at a figure of $200,00 based on seventeen years inflation (actually the relevant amount of time is sixteen years: the child is already over one year old). Plaintiff presented no economist, as is the practice in wrongful death case, nor was there evidence of

reasonableness of the claimed amounts. While defendant could have cross-examined the plaintiff or presented his own evidence on this issue, the Court is nonetheless left with the conviction that the amount of the verdict here is excessive. The interests of justice would best be served, this Court concludes, by a new trial on this issue so that both sides can present evidence on the actual expected costs of raising a child born in 1980, rather than by permitting the existing verdict, which is necessarily found on speculation, to stand.

Accordingly, in an accompanying order, the court has vacated the $310,000 verdict rendered by the jury in this case. A new trial has been ordered on the issue of the amount of plaintiff's medical expense, unless plaintiff agrees to remit the excess $4,000. When the amount of the those expenses are determined, judgment for that amount plus $100,000 for pain, suffering, and mental anguish will be

entered. Defendant's remaining motions for judgment notwithstanding the verdict and for new trial are denied, except that should the Court be reversed on the informed consent count, then a new trial is granted on the negligence count, and should the Court of Appeals reverse this Court's determination that the cost of raising plaintiff's child is not recoverable, then a new trial is granted limited to the amount of those damages.

/signed Lous F. Oberdorfer
UNITED STATES DISTRICT JUDGE
October 7, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANDRA J. HARTKE	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action NO. 79-3447
	:	
DR. WILLIAM MCKELWAY	:	
	:	
Defendant	:	
	:	

ORDER

For the reasons stated in the accompanying Memorandum, it is this 7th day of October, 1981, hereby:

ORDERED: That the judgment on the verdict entered in the above captioned case is hereby VACATED, and the motion by the defendant for a new trial is granted, limited to the issue of the amount of plaintiff's medical expenses, unless the plaintiff, within twenty (20) days after service of this order shall file a remittitur with the Clerk of this Court remitting the sum of $4,000.00. Upon filing of said remittitur, counsel for the defendant shall submit a

form of order granting judgment to the plaintiff in the amount of $106,000.00. And it is further

ORDERED: That defendant's remaining motions for judgment notwithstanding the verdict and for new trial are hereby DENIED, except that, should this Court's determiation tht the informed consent determination of the jury is valid be reversed, then defendant's motion for new trial on the issue of negligence is GRANTED, and should this Court's determination that damages for the cost of raising plaintiff's child are not allowable be reversed, then defendant's motion for new trial is GRANTED, limited to the issue of the amount of such cost.

/signed Louis F. Oberdorfer

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANDRA J. HARTKE	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action NO. 79-3447
	:	
DR. WILLIAM MCKELWAY	:	
	:	
Defendant	:	
	:	

Has the plaintiff proved that the defendant negligently failed to cauterize her fallopian tubes?

Yes [X]

No [ ]

Has the plaintiff proved that pregnancy was a material risk following the procedure she underwent, that the defendant failed to inform her of this risk and that had a reasonable person in her circumstances been informed, that person would not have consented to the procedure.

Yes [X]

No [ ]

If your answer to both questions is "No" proceed no further and inform the Court you have reached a verdict.

If your answer to either or both questions is "Yes", proceed to the next question.

Enter the amount of damages you feel that plaintiff proved she sustained for any or all of the following:

Expenses _____ $10,000.00

Pain, suffering and mental anguish _____ $100,000.00

Anticipated costs of raising this child until age 18 less any benefit she received or in the future will receive by reason of the love, joy, happiness, etc., she experienced in raising a healthy, happy child $200,000.00

Total damages _____ $310,000.00

No. 83-500

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

SANDRA H. HARTKE

Petitioner

vs.

DR. WILLIAM MCKELWAY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent,
Dr. William McKelway

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IN THE
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vs.

DR. WILLIAM MCKELWAY

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ON PETITION FOR WRIT OF CERTIORARI TO
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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This "wrongful conception" case arises out of the petitioner's conception of and giving birth to a healthy baby girl following the performance of a sterilization pro-

cedure by the respondent. The petitioner brought this action in the United States District Court for the District of Columbia sitting in diversity jurisdiction.

After a jury verdict for the petitioner on counts sounding in negligence and lack of informed consent, the District Court disallowed the award of childrearing expenses because there was no evidence that the petitioner underwent sterilization to avoid the expenses of raising another child. Hartke v. McKelway, 526 F.Supp. 97, 105 (D.D.C. 1981), reprinted in Petition for Writ of Certiorari (hereinafter "Petition") at 26 App. B. The District Court also found that the evidence was clear that the petitioner underwent sterilization for therapeutic, not economic, reasons, and that she prized the child she bore. Id., reprinted in Petition at 27 App. B. Nevertheless, the District Court upheld the jury's award of damages for the petitioner's medical expenses, pain,

suffering and mental anguish resulting from the pregnancy and childbirth. Id. at 104, reprinted in Petition at 21 App. B - 22 App. B.

On appeal, the United States Court of Appeals for the District of Columbia Circuit did not decide whether a plaintiff in a wrongful conception case may recover the expenses incurred in raising a child. Hartke v. McKelway, 707 F.2d 1544, 1552 (D.C. Cir. 1983), reprinted in Petition at 14 App. A - 15 App. A. Rather, the Court of Appeals affirmed the decision of the District Court that under the evidence presented in this case, the jury could not rationally have found that the birth of this child constituted an injury to this plaintiff and that an award of childrearing expenses would only give this plaintiff a windfall. Id. at 1557, reprinted in Petition at 26 App. A.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT RESTS ON ADEQUATE AND INDEPENDENT STATE GROUNDS

A federal court, sitting in diversity jurisdiction, is considered to be another court of the state for the purpose of adjudicating the rights of the parties according to applicable state law. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945); Angel v. Bullington, 330 U.S. 183, 187 (1947).

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 125 (1944), citing, Murdock v. City of Memphis, 20 Wall. 590 (U.S. 1874), Berea College v. Kentucky, 211 U.S. 45 (1908), Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917), and Fox Film Corp.

v. Muller, 296 U.S. 207 (1935). It follows then that this Court will not review judgments of the inferior federal courts, sitting in diversity jurisdiction, that rest on adequate and independent state grounds. C.f., Miree v. DeKalb County, 433 U.S. 25, 33 (1977) (case remanded to U.S. Court of Appeals as this Court will not undertake to decide the correct outcome under state law).

In setting aside the award of childrearing expenses in the instant case, the District Court ruled that there was no evidence ". . to support the view that the petitioner had sought to avoid the expenses of raising another child". Hartke v. McKelway, 526 F.Supp. at 105, reprinted in Petition at 26 App. B. It concluded that the evidence was clear that the petitioner's sole concern in undergoing sterilization was that she had previously suffered an ectopic pregnancy and feared for her life should she become pregnant again. Id. Similarly, the Court of

Appeals characterized the evidence as "unambiguous and overwhelming" that the petitioner's reasons for undergoing sterilization were entirely therapeutic. Hartke v. McKelway, 707 F.2d at 1555 & n. 12, reprinted in Petition at 21 App. A & n. 12. The petitioner simply failed to adduce evidence that a reason for undergoing sterilization was to avoid the costs of raising a child. Id. at 1557 n. 14, reprinted in Petition at 24 App. A n. 14.

In the District of Columbia, the party asserting an issue has the initial burden of going forward with evidence as to each material element of such issue. Nader v. de Toledano, 408 A.2d 31, 48 (D.C. 1979), cert. denied, 444 U.S. 1078 (1980).[1/] In the instant case,

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1/ In Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), this Court held that under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), burden of proof is substantive and governed by applicable state law in diversity cases before federal courts.

the Court of Appeals, in ruling on the nature and sufficiency of the evidence as to damages, held that the petitioner had failed to come forward with any evidence that the birth of the child constituted an "injury" to the petitioner. Hartke v. McKelway, 707 F.2d at 1557, reprinted in Petition at 26 App. A. Thus, the common law of the District of Columbia, placing on the plaintiff the burden of producing evidence as to each element of damages, provides ample support for the disallowance of childrearing expenses under the facts of this case.

Inasmuch as the decision of the United States Court of Appeals for the District of Columbia Circuit rests on adequate and independent state grounds, this Court should deny the Petition for Writ of Certiorari.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT PRESENTS NO CONSTITUTIONAL ISSUE

The petitioner's confused and inarticulate attempt to fashion a constitutional argument out of this Court's decisions in Roe v. Wade, 410 U.S. 113 (1973) and Griswold v. Connecticut, 381 U.S. 479 (1965) is without merit. Contrary to the petitioner's contentions, the Court of Appeals did recognize that under Roe and Griswold it was required to respect the petitioner's decision to become sterile. Hartke v. McKelway, 707 F.2d at 1552-53, reprinted in Petition at 15 App. A. In fact, the Court of Appeals affirmed the District Court's allowance of damages for the petitioner's medical expenses, pain, suffering and mental anguish resulting from the pregnancy and childbirth. Id. at 1557-58 n. 16, reprinted in Petition at 26 App. A - 28 App. A n. 16. The Court of Appeals simply

held that the petitioner had not provided the evidenciary foundation to support an allowance of childrearing expenses in this case. Id. at 1557, reprinted in Petition at 25 App. A - 26 App. A.

The Court of Appeals' determination that the petitioner had not adduced evidence of injury to support childrearing expenses does not restrict or conflict with this Court's decisions recognizing the constitutional right of privacy.[2/] The Court of Appeals did not decide whether this Court's right of privacy decisions allow the plaintiff to recover, as an element of damages in all wrongful conception cases, the costs of raising the child. Id. at 1552-53, reprinted

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2/ E.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973); Akron v. Akron Center For Reproductive Health, Inc., 103 S.Ct. 2481 (1983); Planned Parenhood Association v. Ashcraft, 103 S.Ct. 2517 (1983); Simopolous v. Virginia, 103 S.Ct. 2532 (1983).

in Petition at 14 App. A - 15 App. A. Indeed, the Court of Appeals in dicta acknowledged that, given the appropriate evidentiary foundation, such an allowance may be required. Id. This Court's right of privacy decisions have never been held to supplant the obligation of a plaintiff, in a civil action between two private litigants, to come forward with sufficient evidence from which a jury could reasonably infer the existence of a fact to be proved. Accordingly, this Court's decisions dealing with the constitutional right of privacy are irrelevant to the question of whether the petitioner may recover childrearing expenses under the evidence presented at trial in this case.

Lastly, it should be noted that this Court has previously denied petitions for writ of certiorari in cases involving the issue presented here. Terrell v. Garcia, 496 S.W.2d 124 (Tex.App. 1973), cert. denied,

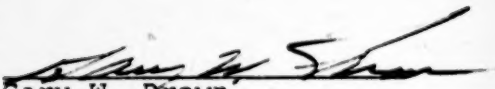
415 U.S. 927 (1974); Cockrum v. Baumgartner, 447 N.E.2d 385 (1983), cert. denied sub nom. Raja v. Michael Reese Hospital and Medical Center, 52 U.S.L.W. 3248 (U.S. October 4, 1983).

Inasmuch as the decision of the United States Court of Appeals for the District of Columbia Circuit does not incorrectly adjudge a federal right, this Court should deny the Petiton for Writ of Certiorari.

CONCLUSION

The decision of the United States Court of Appeals for the District of Columbia Circuit rests on adequate and independent state grounds and presents no constitutional issue for review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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